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ABSTRACT

This outline sets forth assistive technology rights of students under the Individuals with Disabilities Education Act (IDEA), the Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1990, Section 504 of the Rehabilitation Act of 1973, Americans with Disabilities Act, and the regulations implementing these statutes. The paper defines "assistive technology device" and "assistive technology service," outlines responsibilities of states receiving IDEA funds to provide such devices and services, notes eligibility requirements, examines requirements for vocational education programs, considers the use of assistive technology devices and services to enable placement in regular education settings, discusses the provision of auxiliary aids to students in postsecondary education programs, reviews the scope of the term "auxiliary aids and services," and points out that individuals with disabilities in public and private schools must be afforded an opportunity to participate in or benefit from an aid or service equal to that afforded others. References to the United States Code, the Code of Federal Regulations, and court cases are provided to support the paper's views. (JDD)

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ASSISTIVE TECHNOLOGY FOR STUDENTS WITH DISABILITIES:

RIGHTS UNDER FEDERAL LAW

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by Eileen Ordover

Scope: This outline sets forth assistive technology rights under the Individuals with Disabilities Education Act, the Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1990, Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act, and the regulations implementing these statutes. Children, youth and adults with disabilities may also have rights to assistive technology under Medicaid, the EPSDT [Early Prevention, Screening, Diagnosis and Treatment] program, or the state vocational rehabilitation programs funded by the federal Rehabilitation Act. Advocates may obtain information about assistive technology from their state's federally-funded Tech Act center.[1]

I. The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§1400 *et seq.*

A. IDEA Part B -- Children and Youth Age 3 through 21

1. States, school systems and other public agencies responsible for educating students with disabilities must provide "assistive technology devices" and "assistive technology services" as needed to ensure that a child with a disability receives the free appropriate public education[2] to which IDEA entitles him or her. 34 C.F.R. §300.308. Depending upon a child's individual needs, assistive technology devices and services may be required as a form or part of "special education,"[3] as a "related service,"[4] or as a component of the "supplementary aids and services"

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[1] The "Tech Act" is the Technology-Related Assistance for Individuals with Disabilities Act of 1988, as amended. The Act funds statewide projects designed to increase access to assistive technology. Activities of state Tech Act centers include, among other things, information dissemination, training and technical assistance, needs assessment and provision of assistive technology devices and services. *See* 29 U.S.C. §2211. To locate the Tech Act center in your state, contact the RESNA Technical Assistance Project, 1101 Connecticut Avenue, NW, Suite 700, Washington, DC 20036 (Tele.: 202 857-1141).

[2] The required "free appropriate education" consists of, *inter alia*, "special education and related services." 20 U.S.C. §1401(a)(18); 34 C.F.R. §300.8 (1993) (formerly §300.4).

[3] For purposes if IDEA, "special education" means "specially designed instruction...to meet the unique needs of a child with a disability...." 20 U.S.C. §1401(a)(6); 34 C.F.R. §300.17 (1993) (formerly 34 C.F.R. §300.14). This instruction can be provided in a variety of settings, including the regular education classroom. *See id.*

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necessary for effective education in the regular education classroom or other least restrictive environment. *Id.* [5] Like all other entitlements under IDEA, assistive technology devices and services must be provided at no cost to parent or child. 20 U.S.C. §1401(a)(18).

2. For purposes of IDEA, "assistive technology device" means "any item, piece of equipment, or product system, whether acquired commercially or off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of children with disabilities." 20 U.S.C. §1401(a)(25); 34 C.F.R. §300.5. The U.S. Department of Education/Office of Special Education Programs ("OSEP"), which enforces IDEA, recently took the position that this expansive language encompasses hearing aids. *See Response to Inquiry of Seiler*, 20 IDELR [Individuals with Disabilities Education Law Report] 1216 (OSEP 11/19/93). *See also Response to Inquiry of unidentified correspondent*, 18 IDELR 1037 (OSEP 4/6/92)(FM auditory training system as assistive technology); *Response to Inquiry of Lambert*, 18 IDELR 1039 (OSEP 4/24/92) (calculator as assistive technology). Wheelchairs, too, would fall within this broad definition.[6]

3. "Assistive technology service" means "any service that directly assists a child with a disability in the selection, acquisition or use of an assistive technology device." 20 U.S.C. §1401(a)(26); 34 C.F.R. §300.6. Assistive technology services include evaluation of assistive technology needs, including a functional evaluation of the child in his or her usual environment; purchase, lease or other acquisition of assistive technology devices; the selection, design, fitting, customizing, adapting, retaining, repairing or replacing of devices; coordinating the use of assistive technology devices with the child's education program, and with other interventions, therapies and services; training and technical assistance for the child, parents and other family members; and training and technical assistance for professionals working with the child, employers and for other individuals "substantially involved in the major life functions of children with disabilities." 20 U.S.C. §1401(a)(26); 34 C.F.R. §300.6.

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[4] "Related services" are "...transportation and such developmental, corrective, and other supportive services...as may be required to assist a child with disabilities to benefit from special education...." 20 U.S.C. §1401(a)(17); 34 C.F.R. §300.16 (1993) (formerly §300.13).

[5] 34 C.F.R. §300.308 was added to the regulations implementing IDEA in 1992. See 57 Fed. Reg. 44794 *et seq.* (September 29, 1992). Even prior to the promulgation of a regulation explicitly addressing assistive technology (and before Congress in 1990 amended IDEA to include definitions of assistive technology devices and services--see discussion below), the U.S. Department of Education's Office of Special Education Programs ("OSEP"), which enforces IDEA, recognized that children with disabilities are entitled to assistive technology where necessary to provide a free appropriate public education in the least restrictive environment. *See Response to Inquiry of Goodman*, 16 EHLR [Education for the Handicapped Law Report] 1317 (OSEP 8/10/90); see also *San Francisco Unified School District, Case No. SE 85461*, 1985-86 EHLR DEC. 507:416 (California due process hearing decision 10/25/85) and state due process hearing decisions cited in paragraph 5, below.

[6] Apart from the definition of "assistive technology," school districts may be required to provide wheelchairs as part of their obligation to provide transportation. As explained in note 3, above, the "related services" school systems must provide include transportation. "Transportation" means "travel in and around school buildings" (as well as travel to and from schools). 34 C.F.R. §300.16(b)(14)(i)-(ii). This may require the provision of a wheelchair for use in school. *See Response to Inquiry of Stohrer*, EHLR [Education of the Handicapped Law Report] 213:209 (OSEP 2/17/89). "Transportation" also includes "specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability." 34 C.F.R. §300.16(b)(14)(iii).

4. States receiving funds under IDEA must implement procedures for "adopting, if appropriate, promising practices, materials and technology, proven effective through research and demonstration," 20 U.S.C. §1413(a)(3)(B)(iii), and for "acquiring and disseminating to teachers, administrators and related services personnel significant knowledge derived from education research and other sources." 20 U.S.C. §1413(a)(3)(B)(ii); *see also* 34 C.F.R. §300.382 (formerly §300.385). In addition, local school systems have an affirmative obligation to keep abreast of promising new methods and strategies for meeting the educational needs of children with disabilities, and to employ them as appropriate in designing and implementing IEPs. *See Timothy W. v. Rochester School District*, 875 F.2d 954, 973 (1st Cir. 1989), *cert. denied*, 493 U.S. 893 (1989) ("...educational methods...are not static, but are constantly evolving and improving. It is the school district's responsibility to avail itself of these new approaches in providing an education program geared to each child's individual needs").

5. Where called for in view of a child's individual needs, or where necessary to implement the IEP, assistive technology must be made available for use outside of school. *See* Letter of November 27, 1991 by Judy A. Schrag, U.S. Department of Education/Office of Special Education Programs ("OSEP"), reprinted at 18 IDELR 627; *Greenwood County School District #52*, 19 IDELR 355 (South Carolina due process hearing decision, 8/22/92); *In re Mary H.*, 1984985 EHLR DEC. [Education of the Handicapped Law Report Decisions] 506:325 (Massachusetts due process hearing decision, 11/6/84).

6. Like all decisions regarding a child's IEP and placement, decisions regarding the use and provision of assistive technology devices and services must be based upon appropriate evaluation data and made by the child's IEP team. *See generally* 20 U.S.C. §1401(a)(20); 34 C.F.R. §§300.344-300.345; 34 C.F.R. §300.500(b); 34 C.F.R. §300.532(f).[7] Administrators or school boards may not reverse the team's determination. *See* November 27, 1991 Schrag letter, *supra.*

7. Depending upon the particular circumstances, schools may also be required to utilize assistive technology to meet other IDEA requirements, such as the requirements that tests used to evaluate students with sensory, manual or speaking impairments be selected and administered so as to best ensure that results accurately reflect whatever the test purports to measure, rather than simply reflecting the student's impairment (34 C.F.R. §300.532(c)); that evaluation materials be provided in the child's native language "or other mode of communication" (20 U.S.C. §1412(5)(C); 34 C.F.R. §300.532(a)(1)); and that students with disabilities have equal opportunities for participation in the full range of educational programs, nonacademic programs and services, and extracurricular activities offered (34 C.F.R. §§300.305 - 300.307)

B. IDEA Part H -- Early Intervention Services for Infants and Toddlers Age Birth through Two

1. Once a state receives its fifth year funding under IDEA Part H, "infants and toddlers with disabilities" and their families have an enforceable right to appropriate early

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[7] For a state administrative due process hearing decision ordering a school district to evaluate a child's assistive technology needs, see *Maynard School District*, 20 IDELR 394 (Arkansas 6/3/93).

intervention services,[8] provided pursuant to a properly developed Individualized Family Service Plan ("IFSP"). *See generally* 20 U.S.C. §§1471 *et seq.*; 34 C.F.R. part 303. Eligible "infants and toddlers with disabilities" are children from birth through age two who are experiencing developmental delays in cognitive, physical, communication, or social or emotional development, or in self-help skills (adaptive development), or who have a diagnosed physical or mental condition which has a high probability of resulting in developmental delay. 20 U.S.C. §1472(1). At a state's option, "infants and toddlers with disabilities" may also include children at risk of having substantial developmental delays if early intervention services are not provided. *Id.* "Early intervention services are developmental services which...are designed to meet the developmental needs of an infant or toddler with a disability in...physical development, cognitive development, communication development, social or emotional development, or adaptive development...." 20 U.S.C. §1472(2); 34 C.F.R. §303.12.

2. "Assistive technology devices" and "assistive technology services" (as defined by 20 U.S.C. §1401(a)(25), (26)--see above) are explicitly included in the statutory definition of "early intervention services," *see* 20 U.S.C. §1472(2)(E)(xiii), and so must be provided as appropriate to meet the individual developmental needs of an infant or toddler with disabilities, as determined through the IFSP process.

3. As all other early intervention services, assistive technology devices and services must be provided regardless of ability to pay. 34 C.F.R. §§303.12(a)(3)(iv), 303.520(b)(3).

II. The Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1990 ("Perkins Act"), codified at 20 U.S.C. §§2301 *et seq.*

1. The 1990 Perkins Act, which imposes stringent new requirements regarding the content and quality of the high school (and other) vocational education programs it funds,[9] also places an affirmative obligation upon vocational education programs to ensure equal, meaningful access and participation by students with disabilities and other members of what the Act calls "special populations." *See generally* 20 U.S.C. §§2328, 2343(12)(B).

2. In order to comply with their obligation to ensure equitable participation by students with disabilities, vocational education programs must, among other things, "assess the special needs of students...with respect to their successful completion of the vocational education

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[8] The legislation creating Part H initially provided that by their fifth year of participation, states were to provide appropriate early intervention services to all eligible children, or withdraw from the federal funding program. In 1991, however, Congress amended the legislation to add an "extended participation" component, pursuant to which states behind schedule might delay entering the entitlement phase, albeit at lower funding levels than states prepared to participate at the fifth year entitlement level. See 20 U.S.C. §1475(e). As of Fall, 1993 forty-one states were either at the entitlement point, or had applications for entitlement-level funding pending.

[9] The Perkins Act requires vocational education programs to (1) provide students with strong experience in and understanding of all aspects of the industry they are planning to enter, and (2) integrate vocational and academic education, including both basic and advanced academics and problem-solving skills. For more information about these aspects of the Perkins Act, contact the Center for Law and Education's VOCED Project at 1875 Connecticut Ave., N.W., Suite 510, Washington, D.C. 20009 (202) 986-3000. Fact sheets on the Perkins Act are available from the Center's Cambridge, MA office.

program in the most integrated setting possible," 20 U.S.C. §2328(c)(2), and provide students with disabilities with curriculum modification, equipment modification, classroom modification, supportive personnel and instructional aids and devices. 20 U.S.C. §2328(c)(3).

3. Students with disabilities enrolled in vocational education programs retain all rights under IDEA, §504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act. 20 U.S.C. §2328(a)(3).

III. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794

A. Public Elementary and Secondary Education Programs

1. U.S. Department of Education regulations implementing §504[10] require public elementary and secondary education programs to provide a "free appropriate public education" to all students with disabilities within their jurisdiction. 34 C.F.R. §104.33(a). The required free appropriate public education must consist of regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as well as the needs of nondisabled students. 34 C.F.R. §104.33(b).[11] Assistive technology devices and services, like other forms of "special education" and "related aids and services," must be provided to the extent necessary to meet this standard. *See, e.g., Harrison County (WV) School District*, EHLR 353:120 (U.S. Department of Education/Office of Civil Rights complaint decision, 6/29/88) (school district's delay in obtaining communication device for student who could not speak and refusal to allow her to use it regular education classes violated obligation to provide related aids and services under §104.33).

2. In addition to the requirements of 34 C.F.R. §104.33, school systems are required to provide assistive technology devices or services to accommodate a student's disability if necessary to permit the student to attend school. *C.f. Tatro v. State of Texas*, 625 F.2d 557, 564-65 (5th Cir. 1980) (provision of catheterization required as a §504 matter).

3. Under §504, as under IDEA, students with disabilities are entitled to placement in the regular education environment with necessary supports "unless it is demonstrated that...education...in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. §104.34(a). Assistive technology devices and services thus must be made available when needed as supplementary aids or services to enable

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[10] Section 504 as amended provides in relevant part that "[n]o otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving federal financial assistance...." 29 U.S.C. §794(a).

[11] The §504 regulations do not define "special education" or "related aids and services." However, Appendix A to the regulations states that "[special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective or other supportive services...." 34 C.F.R. part 104, App. A, para. 23. This language largely parallels the relevant IDEA definitions (see above), and so should be similarly construed to embrace assistive technology devices and services. In addition, the §504 regulations themselves state that one way to meet the §504 obligation to provide a free appropriate public education is to implement an IEP meeting IDEA standards. *See* 34 C.F.R. §104.34(b)(2).

placement in regular education settings.

4. Regulations applicable to *all* programs and activities receiving funds from the U.S. Department of Education provide that it is illegal for recipients to afford a "qualified handicapped individual" an opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded others, or to provide a disabled student with an aid, benefit or service that is not as effective as that provided to others. 34 C.F.R. §104.4(b)(ii)-(iii).[12] Reasonable accommodations in the form of assistive technology may be required in order to comply with this regulation, even where the right to a "free appropriate public education" under 34 C.F.R. §104.33, or the right to placement in the regular education environment under 34 C.F.R. §104.34(a), is not implicated.

5. Depending upon the particular circumstances, public schools and school systems may be required to utilize assistive technology to meet a number of other obligations under the §504 regulations, including obligations regarding program accessibility and architectural barrier removal (34 C.F.R. §§104.21 - 104.23); the requirement that tests used to evaluate students with sensory, manual or speaking impairments be selected and administered so as to best ensure that results accurately reflect whatever the test purports to measure, rather than simply reflecting the student's impairment (34 C.F.R. §104.35(b)(3)); and the provision of equal opportunity for participation in nonacademic and extracurricular services and activities (34 C.F.R. §104.37).

B. Postsecondary Education

1. Postsecondary education programs that receive or benefit from federal funds must "take such steps as are necessary to ensure that no handicapped students is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination...because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills." 34 C.F.R. §104.44(d)(1). *See also U.S. v. Board of Trustees for University of Alabama*, 908 F.2d 740 (11th Cir. 1990) (34 C.F.R. §104.44(d)(1) requires provision of auxiliary aids regardless of whether student qualifies for financial aid).

2. "Auxiliary aids may include taped texts, interpreters, or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for students with manual impairments, and other similar services and actions." 34 C.F.R. §104.44(d)(2). The regulation expressly excludes "...individually prescribed devices, readers for personal study, or other devices or services of a personal nature." *Id.*

3. Depending upon the particular circumstances, assistive technology might be required in order to meet other requirements set out in the §504 regulations, including those regarding program accessibility and architectural barrier removal (34 C.F.R. §§104.21 - 104.23); the requirements of 34 C.F.R. §§104.4(b)(ii)-(iii), described in paragraph II(A)(4), above; and requirements regarding equal opportunity in the provision of housing and nonacademic services (34 C.F.R. §§104.45, 104.47).

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[12] These regulations thus apply to preschool programs operated by recipients of federal funds (public and private), as well as to adult education programs and postsecondary programs. Postsecondary programs are discussed below.

IV. The Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq.*

A. Public Schools and Institutions

1. Title II of the ADA prohibits discrimination against qualified individuals with disabilities in the services, programs or activities of a "public entity." "Public entities" include school systems, publicly-operated preschool programs, public colleges, and other instrumentalities of state and local government. *See* 42 U.S.C. §§12131-12132. Title II applies regardless of whether the service, program or activity in question is federally funded.

2. The regulations implementing Title II provide that it is illegal for a public entity to afford a qualified individual with a disability an opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded others, or to provide an aid, benefit or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others. 28 C.F.R. §35.130(b)(1)(ii), (iii). Where "auxiliary aids and services" are required to comply with this regulation or with other aspects of the ADA or Title II regulations (including program accessibility, 28 C.F.R. §35.149 *et seq.*) they must be provided. *See* 28 C.F.R. §35.130(f).[13]

3. For purposes of Title II, the term "auxiliary aids and services" includes "(1) [q]ualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunication devices for deaf persons (TDDs), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments; (2) [q]ualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments; (3) [a]cquisition or modification of equipment or devices; and (4) [o]ther similar services and actions." 28 C.F.R. §35.104.

4. 28 C.F.R. §35.160(b)(1), placed in a subpart of the regulations entitled "Communications," requires public entities to "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program or activity conducted by" the entity. In determining what kind of auxiliary aid or service is necessary, primary consideration must be given to the request of individuals with disabilities. 28 C.F.R. §35.160(b)(2).[14]

5. Auxiliary aids required to provide the nondiscriminatory treatment required by the

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[13] The regulations explicitly provide, however, that the provision of "personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature...." is not required. 28 C.F.R. §35.135. IDEA contains no such limitation (see paragraph I(A)(2), above), nor do the §504 regulations regarding preschool, elementary and secondary education (see 34 C.F.R. Part 104, Subpart D).

[14] 28 C.F.R. §§35.160 - 35.169, entitled "Subpart E - Communications, do "not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burden." 28 C.F.R. §35.164. This caveat is limited to Subpart E.

ADA and Title II regulations must be made available at no cost. 28 C.F.R. §35.130(f).

B. Private Schools

1. Title III of the ADA prohibits discrimination on the basis of disability in places of public accommodation, which by statutory definition are facilities operated by private entities. 42 U.S.C. §§ 12181(7), 12182. "[A] nursery, elementary, secondary, undergraduate or postgraduate private school, or other place of education" is a covered "public accommodation." 42 U.S.C. §12181(7)(J).

2. Prohibited discrimination includes "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden." 42 U.S.C. §12182(b)(2)(A)(iii). See also 28 C.F.R. §36.303.

3. The Title III definition of "auxiliary aids and services" is identical to the Title II definition set forth above. See 28 C.F.R. §36.303.[15]

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[15] Like the Title II regulations, the Title III regulations exempt "personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; or services of a personal nature...." 28 C.F.R. §36.306.